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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-215230 **DATE:** February 14, 1985

MATTER OF: D. J. Findley

DIGEST:

1. Provision in invitation for bids for service contract which permits the government to deduct amounts from the contractor's payments for unsatisfactory services does not conflict with any reperformance rights of the contractor. Although the standard "Inspection of Services" clause permits the government to require reperformance at no cost to the government, the protester has failed to show that defective services may be reperformed without the government receiving reduced value.

2. Performance Requirements Summary provisions in invitation for bids for service contract, which permit the government to deduct from the contractor's payments an amount representing the value of several service tasks where a random inspection reveals a defect in only one task and permits deduction for defective performance of tasks not specifically assigned a value where stated tasks under damage provision already total 100 percent of the contract price, impose an unreasonable penalty.

3. Requirement that contractor provide written notification of corrective action to be taken in response to government finding of deficient performance is not advance contractual agreement to the deficiency alleged by agency. Requirement does not preclude contractor from challenging the agency's finding that a deficiency has occurred under the contract disputes clause.

D. J. Findley (Findley) protests against the format used by the Department of the Air Force (Air Force) for soliciting bids in invitation for bids (IFB) No. F04699-84-B-0022 to obtain services necessary to operate the Sacramento Air Logistics Center technical order and decal distribution office and the base information and transfer system located at McClellan Air Force Base, California.

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The initial protest contained objections to a number of provisions in the IFB. However, Findley has withdrawn several objections and agrees that others have been rendered moot or academic by Air Force corrective action in response to the protest. We also note that the Air Force has withdrawn its initial contention that the protest is untimely, and there is now no dispute that Findley filed a timely protest with our Office prior to bid opening.

Findley contends that the IFB contains improper provisions concerning quality control. Specifically, Findley alleges that the Air Force IFB quality control provisions which require reperformance and deduction for deficiently performed service is an unauthorized deviation from the Defense Acquisition Regulation (DAR) required Inspection of Services (IOS) clause, DAR, § 7-1902.4, reprinted in 32 C.F.R. pts. 1-39 (1984), and that its enforcement constitutes an impermissible penalty. Findley also alleges that the enforcement methodology permits deductions in excess of the value of tasks actually performed deficiently and, thus, constitutes an improper liquidated damages clause under GAO decisions.

We deny Findley's protest that the IFB clause which permits the Air Force to both deduct from the contract price and require reperformance for a deficiently performed service is an unauthorized deviation from the IOS clause. We sustain Findley's contention that the enforcement methodology provisions constitute an improper liquidated damages clause.

The IFB incorporated by reference the standard IOS clause contained in DAR, § 7-1902.4. The clause generally must be included in all Air Force fixed-price service contracts. See DAR, § 7-1902. It reserves the government's right to inspect all services to the extent practicable, at all times during the contract term, and also provides as follows:

> "If any services performed hereunder are not in conformity with the requirements of this contract, the Government shall have the right to require the Contractor to perform the services again in conformity with the requirements of the contract, at no additional increase in total contract amount. When the services to be performed are of such a nature that the defect cannot be corrected by reperformance of the services, the Government shall have the right to (i) require the Contractor to immediately take all necessary steps

> to ensure future performance of the services in conformity with the requirements of the contract; and (ii) reduce the contract price to reflect the reduced value of the services performed. . . ."

The IFB also contained the following paragraph, H99a, entitled "Payment Computation":

> "Notwithstanding the general provision hereof entitled 'Inspection of Services,' or any interpretation thereof, the government has the right to make permanent deductions from the contract price when the contractor exceeds the maximum allowable deviation from requirements (AQL) and, in addition, require the contractor to reperform the defective service to an acceptable level. It is understood and agreed that the determination by government that the contractor has exceeded the AQL may be based upon random sampling techniques. It is further agreed that the above enumerated rights are in addition to and not in lieu of the rights of the government under any other clause of this contract including the right to terminate pursuant to the clause hereof entitled 'DEFAULT.'"

This clause was developed by Air Force headquarters specifically for use in contracts with performance work standards.

Under the IOS clause, the agency can require the contractor to reperform the services in accordance with contract requirements at no increase in the contract price. Where reperformance is not an appropriate remedy due to the nature of the defect, the government can require the contractor to take all necessary steps to ensure no future violation of contract requirements and reduce the contract price to reflect the reduced value of the services performed.

Findley points out that the IOS clause does not authorize the government to require reperformance and also deduct from the contract price as provided for in the modification to the IOS clause under paragraph H99. Thus, Findley argues the modification is an impermissible deviation from the IOS clause.

Findley concedes that a prior decision of our Office, Environmental Aseptic Services Administration and Larson Building Care Inc. (Environmental), 62 Comp. Gen. 219 (1983), 83-1 C.P.D. ¶ 194, supports the Air Force's

authority to both deduct from the contract price and require reperformance of a service. However, Findley believes this decision is incorrect and should be reconsidered.

In the Environmental decision, as in this case, we recognized that the alleged deviation does not require that the government permit reperformance without regard to the circumstances; rather, it establishes the government's right to require reperformance. This is consistent with the right established under the IOS clause.

We focused on the question whether the services could be reperformed after random sampling so that the government does not receive reduced value. We found that the Air Force had made a case (which the protester had not rebutted) that, even when the enumerated deficient services were satisfactorily reperformed, the government had received reduced value. Accordingly, we found the protester's contention that the deduction provisions are inconsistent with reperformance rights under the IFB was without merit.

While Findley argues that the Environmental decision is incorrect and should be reconsidered, we find that our decision in this respect was correct and note that it has been substantially affirmed by a later decision. See Linda Vista Industries, Inc., B-214447, B-214447.2, Oct. 2, 1984, 84-2 C.P.D. ¶ 380. The Air Force states in the IFB that correction of discrepancies during sampling does not correct the discrepancies in the group which the sampling represents. While Findley disagrees with this position, this disagreement does not refute the Air Force's conclusion that deficient performance even when reperformed can reduce the overall value of the contract. Integrated Forest Management, B-200127, Mar. 2, 1982, 82-1 C.P.D. § 182.

Findley also contends that the solicitation performance requirements summaries are improper and result in disproportionate and punitive deductions. In this connection, the IFB contains additional provisions under the heading Performance Requirements Summary (PRS) that permit the government to sample the contractor's performance of some services randomly and deduct payments for unsatisfactory service in an amount calculated to represent the value the unsatisfactory service bears to all the contract's requirements. To determine that value, the PRS breaks the total contract effort down to its basic component services. The value of unsatisfactory performance under a component service is determined by calculating the percentage any sampled unsatisfactory performance bears to the size of the entire sample, and then multiply it times a fixed percentage

listed in the IFB which represents the value of the component service in comparison with the total contract effort. The IFB also provides an allowable deviation for which the government will not take any deductions.

Findley provides several examples of the allegedly improper category grouping of a number of tasks into a single deduction category, under which, if the contractor fails to perform one task in the category, the contract price is reduced as if the contractor failed to reperform all the tasks listed under the category. For example, Findley points out that under the PRS technical order and decal distribution function, eight tasks are grouped together, representing 35.2 percent of the contract price. These tasks are: (1) packing material to ensure undamaged shipment; (2) matching contents with the appropriate labels; (3) consolidating packages; (4) affixing labels; (5) ensuring contents are serviceable; (6) using red border envelopes as required; (7) meeting processing time; and (8) assuring that ID label expiration date has not been exceeded.

Findley contends that under the contract, if a contractor, when packing these materials, deficiently performs one of these tasks, its contract price is reduced as if it did not perform any of these tasks. Findley asserts that, for example, if the contractor fails to use the red border envelope as required, it would not receive any compensation for its performance of all the other packing tasks, which constitute 35.2 percent of the contract price. Other categories also combine tasks as in the above examples.

Also, Findley argues that the combination of tasks also will result in an unreasonable penalty where time requirements apply to certain tasks within a category. For example, in the Base Information Transfer System, item 8 combines a number of tasks and criteria, each of which can serve as a basis for deducting 5 percent of the contract price. If a contractor performed all of the tasks listed in item 8, but took 11 minutes, which exceed the 10-minute delivery time permitted by the contract to deliver the outgoing mail, it would not receive compensation for any of the tasks it performed under item 8. Thus, the solicitation's deduction system can result in deductions unrelated to the value of the task deficiently performed.

Finally, Findley asserts that, under the PRS for each of the three functions, the Air Force has apparently listed only the major tasks to be performed for each function. The Air Force has apportioned a percentage of the contract price to each of the major tasks. The sum of these percentages is 100 percent for each function. However, under the technical exhibits which accompany each PRS, the Air Force clearly reserves its right to deduct from the contract price for the deficient performance of tasks not listed in the PRS. Since those nonlisted tasks must constitute some percentage of the contract price or a deduction would not be appropriate, then the listed tasks do not represent 100 percent of the value of the services performed and the Air Force improperly has allocated 100 percent of the contract price to those listed tasks. This incorrect apportionment also could result in excessive deductions. Thus, Findley argues all the contract price allocations in the PRS must be revised to recognize that there are nonlisted tasks which constitute a portion of the contract price, or the language in the solicitation should limit deductions to tasks listed on the PRS. Findley maintains that the existing IFB provides for liquidated damages which are in excess of and unrelated to the value of the service deficiently performed.

Essentially, the Air Force response is to deny that the use of these deduction provisions would result in any of these situations. For example, the Air Force states that the methodology permits a certain number of deficiencies to be excused before the deductions apply. Thus, one isolated failure to use a proper envelope will not result in a 35-percent reduction. However, the Air Force does not deny that a repeated failure of one task will result in a deduction as if all tasks listed under the category has occurred without consideration of that one task's importance to the overall operation.

The Air Force also points out that these provisions are standard and approved by Air Force headquarters and that Findley, the incumbent under the previous contracts, has operated under these provisions, and the provisions have worked fairly and reasonably. In this connection, Findley states that its experience with these deduction provisions under the current contract is one of the reasons for questioning these provisions for the follow-on procurement.

We will object to a liquidated damages provision as imposing a penalty if a protester shows that there is no possible relation between the amounts stipulated for liquidated damages and the losses which are contemplated by the

parties. See 46 Comp. Gen. 252 (1966); Massman Construction Co., B-204196, June 25, 1982, 82-1 C.P.D. ¶ 624. We believe that the protester initially met this burden by showing that the solicitation deduction format permits deduction for the total items even though the nonperformance or unsatisfactory performance might relate to less than all of the tasks covered by the item.

It was incumbent on the Air Force in its response to the protester to show that there is a reasonable basis for its measure of damages, which the Air Force failed to do. The Air Force's failure to satisfactorily respond to the protester's allegation with a reason as to why nonperformance or unsatisfactory performance of a task or tasks less than covered by the item, without regard to the nature or seriousness of the task, warrants deduction for the entire item compels us to conclude that the deduction of provisions impose a penalty as to nonvital tasks and would unnecessarily raise the government's cost and have an adverse impact on competition. We therefore sustain the protest to that extent. Linda Vista Industries, Inc., B-214447, B-214447.2, supra; see also Environmental Aseptic Services Administration and Larson Building Care Inc., B-207771, et al., supra.

We also think it is unreasonable for the PRS task categories to total 100 percent of the total contract price where the Air Force reserves the right to deduct for other contract requirements defects not covered under the 100 percent. We think all tasks for which the agency can deduct should be assigned an appropriate share of the contract price. In this connection, with regard to enforcement of tasks not listed in the PRS, the Air Force indicates that all tasks for which deductions will be made are listed under the PRS categories.

The protester also alleges that the IFB improperly provides for the contractor to agree in advance to any deficiency alleged by the quality assurance evaluators (QAE). The challenged provision states the following:

> ". . . The QAE's or their alternates are required to make written entries/annotations regarding the Contractor's performance including any deficiencies. The entries/annotations shall be recorded on prescribed form/log. When deficiencies are recorded by the QAE in the manner prescribed above, the Contractor (or his authorized representative) agrees to enter and

> sign in the prescribed form/log the corrective action taken (or to be taken) to correct the deficiencies and will affix his signature thereto."

The Air Force states that this provision advises the contractor of the QAE's responsibility to make written entries on a prescribed form or log with regard to the contractor's performance including deficiencies found by the QAE. It also requires the contractor to annotate the log to advise the Air Force of corrective action. The Air Force contends that the provision only provides for an administrative procedure for correction of a deficiency after the Air Force has determined the deficiency has occurred.

In reviewing the provision, we think the agency's determination as to whether a deficiency has occurred is a matter of contract administration, and the contractor is not precluded by this provision from challenging an alleged deficiency under the disputes clause of the solicitation. See United Food Service, Inc., B-215538, Oct. 23, 1984, 84-2 C.P.D. ¶ 450. Accordingly, in our view, this clause does not constitute any advance agreement to accept deficiencies alleged by the Air Force.

We sustain the protest in part with respect to the provisions that permit excessive deductions.

We have been advised that the bid opening has occurred and Findley is not low bidder under this IFB. Since the bids have been opened, the Air Force is precluded from amending the solicitation to eliminate any possiblity of excess deductions. However, we do not believe that cancellation and resolicitation are warranted since there was adequate competition and the protester has not shown it has been prejudiced. Linda Vista Industries, Inc., B-214447, B-214447.2, supra. Instead, we are recommending to the Air Force that, in administering the contract to be awarded, it avoid taking deductions under the contract in a manner that imposes a penalty.

The other grounds of protest are denied.

for Milton J. Socolar
Comptroller General
of the United States